

\$~A-36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM(M) 259/2017**

NENI MEMI FOODS PVT LTD

..... Petitioner

Through Mr.N.Mahabir, Mr.Chetan Kumar and
Mr.Prakash Chandra, Advs.

versus

TIP TOP FOOD TECH INDIA

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

%

02.03.2017

CM No.8604-8605/2017 (*exemption*)

Allowed subject to all just exceptions.

CM(M)259/2017 & CM No.8602/2017(stay) CM No.8603/2017

1. By the present petition under Article 227 of the Constitution of India the petitioner seeks to impugn the order dated 27.02.2017 by which the Executing Court only issued notice to the respondent but did not accept the ex parte prayer as made in the application filed by the petitioner to appoint a Local Commissioner to make an inventory of the offending goods. The petitioner had filed a suit seeking injunction against infringement of copyright, passing off, damages, delivery and rendition of accounts against the respondent. The petitioner is engaged in the production of Pop Corn with an alleged unique and highly distinctive packaging. It was stated that the respondents are using a packaging with a layout and trade dress identical to that of the petitioner.

2. When the suit was filed, the trial court had on 26.12.2016 apart from passing an ex parte injunction had also appointed a Local Commissioner to make an inventory of the goods in question.

3. Subsequently, parties settled their disputes and application under Order 23 Rule 3 CPC was filed. As per the application in para 3 it was agreed as follows:-

“iii That the plaintiff has no objection if the finished goods/products seized by the Local Commissioner on 27.12.2016 be released to the defendants for commercial sale through their super stockiest/distributors. The Defendants undertake and state that the goods so released shall be disposed off on or before 26th January 2017. The Defendants further undertake to this Court that if any of the released products are lying unsold after 26th January 2017, the same shall be handed over to the plaintiff.”

4. The stand of the petitioner is that despite lapse of the agreed period of 26th January 2017 which was given to the respondents to sell the unsold products, the respondents are continuing to use the offending packaging for sale of the Pop Corn. He further submits that now in an attempt to overreach the Agreement between the parties as has been recorded in the said application, the petitioner has also started selling Pop Corns in a packaging which is slightly different from the one which was the subject matter of the suit in question.

5. The application filed by the parties was accepted by the court and a consent decree was passed on 10.01.2017. The court also noted the statement of AR of the petitioner and counsel for the respondent and the suit was decreed accordingly.

6. Learned counsel for the petitioner submits that the trial court instead

of accepting the application of the petitioner for appointment of a Local Commissioner to make an inventory of the offending packages which are being used by the respondent in violation of the consent decree passed by the court, simply issued notice to the respondent. He submits that the effect of this order would be that the respondents would be aware about the execution filed by the petitioners and would dissipate/dispose of the offending packages leaving no trace.

7. A Division Bench of this court in *Autodesk Inc and Anr vs. A.V.T. Shankardass and Anr, 2008 (105) DRJ 188* in paragraph 14 held as follows:-

“14. Coming now to the question of guidelines to be set, we have heard both the counsel for the parties. We are conscious of the fact that it is neither feasible nor practical to lay down guidelines, which would cater to numerous and all the situations that may arise. However, some of the following relevant factors and guidelines are being enumerated which the Court may take into consideration on the question of appointment of a Local Commissioner in software infringement and piracy matters:

- (i) The object of appointment of a Local Commissioner in software piracy matters is not, as much to collect evidence but to preserve and protect the infringing evidence. The pirated software or incriminating evidence can only be obtained from the premises of the opposite party alone and in the absence of an ex parte appointment of a Local Commissioner there is likelihood that such evidence may be lost, removed or destroyed;
- (ii) Request for ex parte appointment of a Local Commissioner in

such matters is usual and in fact is intended to sub serve the ends of justice as it is imperative to have an element of surprise so that the actual position is not altered;

(iii) The test of reasonable and credible information regarding the existence of pirated software or incriminating evidence should not be subjected to strict proof or the requirement to demonstrate or produce part of the pirated software/incriminating evidence at the initial stage itself. It has to be tested on the touchstone of pragmatism and the natural and normal course of conduct and practice in trade.

(iv) It may not always be possible for a plaintiff to obtain any admission by employing decoy customers and gaining access to the defendant's premises. Any such attempt also inheres in it the possibility of dis-appearance of the pirated software/incriminating evidence in case the decoy customers is exposed. Accordingly, visit by decoy customer or investigator is not to be insisted upon as pre condition. A report of private Investigator need not be dis-regarded or rejected simply because of his engagement by the plaintiff. The information provided by the private Investigator should receive objective evaluation.

(v) In cases where certain and definite information with regard to the existence of pirated software or incriminating evidence is not available or where the Court may nurture some element of doubt, it may consider asking the plaintiff to deposit cost in Court so that in case pirated software or incriminating evidence is not found then the defendant can be suitably compensated for the obtrusion in his work or privacy.”

The above legal position would also be applicable to cases like the present case.

8. In the light of the above, it is manifest that the impugned order suffers from material illegality.

9. Accordingly, I appoint Mr. Ramaditya Tiwari, Advocate (Mobile No.9810755954) as a Local Commissioner to visit the outlet of the respondent at the following address :-

Suresh Chand Goyal Trading as
Tip Top Food Tech India,
H-274, Sector-2, DSIIDC,
Bawana Industrial Area,
New Delhi-110039

10. The Local Commissioner will seize the packages of Pop Corns with the brand name TIP TOP POPCORN Yellow colour packets which are lying in the premises either packet or as packaging material. After having made a complete list, the seized goods shall be returned back to the respondents on superdari. The Fees of the Local Commissioner is fixed at Rs.75,000/- plus out of pocket expenses. The Local Commissioner need not issue advance notice to the respondents. He will be accompanied by an authorised representative of the petitioner. He will be entitled to seek police protection from the concerned police station having jurisdiction of the area. The SHO concerned is directed to ensure appropriate police protection. The report would be filed before the executing court of Shri Jitender Kumar Mishra, ADJ, Patiala House Courts, New Delhi within two weeks from the date of execution of the Commission.

11. Petition and all pending applications stand disposed of.

12. A copy of this order be given dasti under signatures of the Court

Master to learned counsel for the petitioner and the Local Commissioner.

JAYANT NATH, J

MARCH 02, 2017/n